

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EDWARD JOSEPH McNATT,)	
)	
Petitioner)	
)	
v.)	C. A. No. 05-124 Erie
)	
JUDGE OLIVER LOBAUGH, <u>et al.</u> ,)	
)	
Respondents.)	

PETITIONER'S MOTION FOR EVIDENTIARY HEARING

AND NOW, comes the petitioner, Edward Joseph McNatt, by his attorney, Thomas W. Patton, Assistant Federal Public Defender, and files his Motion for Evidentiary Hearing. In support thereof Petitioner states as follows:

1. On May 17, 2007, the District Court referred this case back to this Court for a Report and Recommendation on the issue of whether Mr. McNatt's claims in his petition for a writ of habeas corpus were exhausted or procedurally defaulted and, if so, whether the procedural default should be excused because its enforcement would result in a miscarriage of justice. (Dkt # 33)
2. On June 14, 2007, this Court ordered Mr. McNatt to file a brief on the procedural default/miscarriage of justice issue by July 12, 2007, and ordered the Commonwealth to respond by August 11, 2007. (Dkt # 34)
3. After receiving an extension of time, Mr. McNatt filed his brief on July 19, 2007. (Dkt # 36)
4. To date, the Commonwealth has not filed its response or asked for an extension of time to file its response.

5. The Commonwealth's failure to file a brief or ask for an extension of time to file a brief must be viewed as its concession that enforcing the procedural default that occurred in this case would result in a miscarriage of justice. If the Commonwealth had a non-frivolous response to Mr. McNatt's brief it surely would have filed a response.

6. Accordingly, Mr. McNatt respectfully requests that this Honorable Court schedule an evidentiary hearing on the claims raised in his petition.

Respectfully submitted,

/s/ Thomas W. Patton
Thomas W. Patton
Assistant Federal Public Defender
PA I.D. No. 88653